

Appendix

G

This appendix represents the work of a subcommittee of the Task Force. The Task Force subsequently discussed these concepts at its September and October 2003 meetings. The reader should refer to the text of the Task Force report for discussion regarding which of the details contained in this appendix were endorsed by the Task Force.

*September 22, 2003
Revised Draft*

**A Specialized Water Court for Washington:
Recommendation from Subcommittee to Full Task Force**

This draft paper was developed by a subcommittee of the Water Rights Disputes Task Force for the purpose of developing a recommendation to the full Task Force regarding the structure, jurisdiction, organization, and funding of a specialized water court. This paper builds upon discussion at the July 24, 2003 Task Force meeting and at an August 7, 2003 subcommittee conference call.

In the context of this Specialized Water Court recommendation, the subcommittee recommends the following statement setting forth some basic caveats. The subcommittee recommends that the final report of the Task Force include the following language as part of its recommendation to the Legislature regarding this option:

In assessing possible new structures for resolving disputes involving water rights, particularly disputes that are currently only resolved through conducting a general adjudication, the Task Force identified two new structures that might be used to address these disputes: (1) a specialized Water Court; and (2) an Office of Water Commissioners. Whether the Legislature invests in the creation of either of these new structures depends in large part on whether a sufficient need for these services exists. Preliminary input from the Department of Ecology indicates that there is a significant need for adjudications throughout the state. Currently there are 74 petitioned adjudications on which the department has not acted by initiating a new adjudication. These petitions cover basins across the state. In addition, the department is aware of other basins where conflicts involving water usage regularly arise, suggesting even more need for a commitment of state resources to undertake a significant adjudications effort.

The Task Force does not view itself as an entity with sufficient expertise or qualifications to recommend this kind of commitment by the state. The Task Force recommends that the Legislature engage in a discussion of this topic with a goal of making a determination of whether there is a need for the state to embark on a program to adjudicate a substantial number of basins within the state. The Task Force recommends that the Legislature receive input from a broad group of interested and affected entities before making its determination.

Assuming the Legislature determines a need to adjudicate a substantial number of basins in the state, the Task Force has developed two structures that could assist in this effort. The first structure, a specialized Water Court, is discussed in this paper. The second structure, an Office of Water Commissioners, is discussed in a second paper.

Assuming the Legislature determines a need to adjudicate a substantial number of basins in the state, the Task Force recommends the creation of a Specialized Water Court only if there is adequate funding for its creation and operation. The Court must be set up such that it will operate separate from the general superior courts and be funded separate from the superior courts. The Task Force does not support placing new responsibilities on the judicial system without adequate funding.

Summary—A Specialized Water Court: A specialized Water Court (hereafter the “Water Court”) would be created as a branch of the Superior Court system in the State of Washington.¹ It is assumed that a constitutional amendment would be required to create the Water Court.

The jurisdiction of this court would encompass jurisdiction over general adjudications currently provided for in RCW 90.03.105-90.03.245 and RCW 90.44.220 and jurisdiction over appeals from Ecology water right decisions.² Jurisdiction over these types of water disputes would no longer be in general superior courts but instead would lie exclusively with the Water Court. Therefore, the constitutional provisions establishing the general jurisdiction of the superior courts would be amended accordingly.

Composition of the Water Court. The Water Court would be comprised of four judges appointed by the Governor.³ The Supreme Court would be asked to provide recommendations for candidates for each water judge position. Any candidate would need to meet the minimum qualification of 5 years in the practice of law. Desirable (but not mandatory) qualifications would include experience in the field of water law or related environmental areas and experience in a judicial or quasi-judicial setting. Each of the first three positions would be filled by individuals residing in counties within each of the three court of appeals divisions; *i.e.*, position 1 would reside in a county within division 1, position 2 would reside in a county within division 2,

¹ As a branch of the Superior Court, the Water Court would be a court of record.

² At the July 24, 2003 meeting, the Task Force decided to recommend four options to address the process for resolving disputes involving Ecology water right decisions. Two of these options include a role for a specialized water court. Under option F, an Ecology water right decision would continue to be appealable to the PCHB, but the decision of the PCHB would then be appealable to the Water Court and reviewed according to APA standards. Under option G, an appeal of an Ecology water right decision would go straight to the Water Court, which would hold a *de novo* evidentiary hearing as it reviewed Ecology’s decision. During the August 7, 2003 subcommittee call, the subcommittee decided to recommend to the full Task Force the following variation on these alternatives: a person aggrieved of an Ecology water right decision would be given the option of filing his/her appeal of the Ecology decision at the PCHB or at the Water Court. If the appeal was filed directly at the Water Court, the Water Court would determine whether the case should stay at the Water Court for a *de novo* evidentiary hearing or whether it should be sent to the PCHB for a *de novo* evidentiary hearing. Whenever an appeal of an Ecology water right decision was heard by the PCHB (either because the Appellant initiated the appeal at the PCHB or because the Water Court referred the case to the PCHB), the decision of the PCHB could be appealed to the Water Court, who would consider the appeal pursuant to APA judicial review provisions.

³ The subcommittee will receive information from Ecology during the September 30, 2003 Task Force meeting regarding the workload demand of this court. Based on this information, the Task Force should determine whether to recommend that initial staffing of the Water Court with 3 or 4 judges. If initially staffed with 3 judges, the authorizing legislation and constitutional amendment would provide for subsequent increases in staffing if the court’s workload increases.

and position 3 would reside in a county within division 3. Position 4 would be a “floating” position, the judge appointed to this position could come from any county in the state.

Position Terms and Retention Elections. Except for during the first terms of these positions, each position would serve for six years at a time, with at least one of the positions up for retention election every other year. The Governor would appoint judges to all four positions in the first year. Assuming the first appointments were made in 2005, then in November 2006, position 1 would be up for election, in November 2008, position 2 would be up for election, and in November 2010, positions 3 and 4 would be up for election. The retention election for each position would cover the geographic area of the division of the court of appeals from which the specific individual came. For the “floating” position, the retention election would cover the division from which the specific judge came. Whenever a position became vacant before the judge’s full term had concluded, either by retirement or by failure to be confirmed in a retention election, the remaining portion of the term of the vacated position would be filled by Governor appointment followed by a retention election at the regularly scheduled time for that position. Whenever a position became vacant at the conclusion of a judge’s full term, the vacated position would be filled by Governor appointment followed by a retention election during the general election in the next even numbered year with the judge serving out the remainder of the position’s term.

Central Court Administrator for the Water Court; Regional Offices. A water court administrator would be appointed and would be centrally located in Thurston County. There would be three regional offices of the Water Court established, one in each of the divisions. Water court staff would be located both at the central location and at the regional offices. Court filings would be at the appropriate regional office of the Water Court.

Selection and Responsibilities of Presiding Judge and Assistant Presiding Judge. The judges of the Water Court would select a Presiding Judge and an Assistant Presiding Judge consistent with GR 29. In addition to having the responsibilities designated by rule, the Presiding Judge would be responsible for assigning each new water case filed with the Water Court. Assignment decisions would generally follow this structure: a new case originating in one or more of the counties in division 1 would usually be assigned to the position 1 judge or the “floating” judge, a new case originating in one or more of the counties in division 2 would usually be assigned to the position 2 judge or the “floating” judge, a new case originating in one or more of the counties in division 3 would usually be assigned to the position 3 judge or the “floating” judge. In addition to considering the geographic origin of the cases in making assignments, the Presiding Judge should also make assignments in a way that equitably distributes the court’s workload between the four judges and that addresses any claims of conflict or affidavits of prejudice.

Water Court as Court of State of Washington may sit in any Location around the State. While the administration of the Water Court would be centralized and Water Court filings would be at the appropriate Water Court regional office, the judicial officers of the Water Court could hold hearings at any location around the state. At the outset of each case, the assigned Water Court judge would designate the appropriate venue for the case and thereafter endeavor to hold any evidentiary hearings in the case in or near the locality of the venue. For the

convenience of the parties and the court and to minimize unnecessary expenditures, preliminary hearings and other matters that do not require the taking of evidence could be conducted by phone at the discretion of the assigned Water Court judge.

Role of Water Court in Reviewing Ecology Water Right Decisions. Assuming the Legislature creates a Specialized Water Court, the Court could serve a role in reviewing Ecology water right decisions.

The subcommittee recommends to the full Task Force that it adopt a variation on two options involving review of Ecology water right decisions selected during the July Task Force meeting. (See footnote 2). Under the subcommittee's recommended variation, a person aggrieved by an Ecology water right decision would be given the option of filing his/her appeal of the Ecology decision at the PCHB or at Water Court. If the appeal was filed directly at the Water Court, the assigned judge would determine whether the case should stay at the court for a *de novo* evidentiary hearing or whether it should be sent to the PCHB for a *de novo* evidentiary hearing. Whenever an appeal of an Ecology water right decision was heard by the PCHB (either because the Appellant initiated the appeal at the PCHB or because the superior court referred the case to the PCHB), the decision of the PCHB could be appealed to the Water Court, which would consider the appeal pursuant to APA judicial review provisions.

The subcommittee recommends that the Water Court's decision of whether to retain a case filed directly with the court or send it to the PCHB for an original hearing should be governed by the following non-exclusive list of factors:

- Whether the unique resources of the PCHB (*e.g., ability to provide procedural assistance, ability to provide mediation services free of charge*) would benefit the parties in this case;
- Status of the parties;
- Type of dispute;
- Complexity of the issues;
- Projected size of the case;
- Potential for participation by multiple parties.

Anticipated Workload. As noted above, the jurisdiction of the Water Court would be the jurisdiction to hear original general adjudication actions filed by the Washington State Department of Ecology and to hear appeals from Ecology water right decisions.

General Adjudications Workload. To manage the general adjudication workload of the Water Court, the Department of Ecology would prepare a proposed list of adjudications to be conducted throughout the state. This proposed list would be submitted to the Legislature. The Legislature would develop a final list setting out a ranking for the priority and sequence of the adjudications. The Legislature would also identify the source of the funding that would allow for timely implementation of the listed adjudications. The priority and sequence of the schedule for conducting general adjudications would distribute the timing and sequencing of cases such that the workload in each division of the Water Court is appropriately balanced. *I.e.,* the schedule might provide for "round 1" of adjudications, anticipated to take place between 2005 and 2015.

The “round 1” schedule would provide for the conducting of at least one general adjudication in each division, although it might provide for conducting multiple adjudications in a single division assuming sufficient projected capacity in the Water Court.

Appeals from Ecology Water Resources Decisions Workload. If the role of the PCHB is retained, as under Option F, it is projected that approximately 10 APA styled appeals of PCHB water right decisions would be filed each year. This breaks down to each of the four judges handling approximately 2.5 of these cases each year that would be in the nature of APA appeals.

If the role of the PCHB is eliminated, as under Option G, and the Water Court handles *de novo* evidentiary hearings of appeals from Ecology water right decisions, it is expected that the Water Court would hear approximately 85 of these cases per year. This breaks down to each of the four judges handling about 21 of these cases each year.

If the PCHB can be skipped over at the election of appellants, as under the subcommittee’s variation on Options F & G (see footnote 2 and discussion in text above), it is impossible to project the court’s workload for this category of cases other than to say it would fall somewhere between 10 and 85 cases a year.

Jurisdiction to maintain and update adjudication decrees. The adjudication statutes would be revised to authorize the water court to periodically maintain and update adjudication decrees. However, from a workload perspective, the tasks of maintaining and updating decrees would be considered secondary to the initial tasks of the Water Court to complete adjudications throughout the state and to process appeals from Ecology water resource decisions. Therefore, it is expected that the Legislature would not include these tasks in its initial schedule for conducting adjudications.

Jurisdiction to hear cases involving water quality. At the outset of the operation of the Water Court, its workload would include conducting general adjudication actions filed by the Washington State Department of Ecology and hearing appeals from Ecology water right decisions. However, the Task Force notes that issues involving water quality and water quantity are integrally related. Therefore, the Task Force recommends that the constitutional amendment establishing the jurisdiction of the specialized Water Court be broad enough to allow the Legislature to take action in the future to empower the Water Court to handle cases involving water quality issues (assuming sufficient funding and capacity).

Jurisdiction of Water Court judges in non-water cases. Water Court judges would only have jurisdiction over the water-related cases described in this paper. Water Court judges would not have jurisdiction over other cases typically handled by other judges of the superior court.

Authority to Appoint Water Court Commissioners, Special Masters, Referees, and other Court Staff. Judges of the Water Court would have the same powers as do other superior court judges to appoint court commissioners, special masters, referees, and other court staff to assist them in handling any of the water cases pending before the Water Court. This could be done using a number of approaches. Commissioners and other staff could be assigned to support the Water Court (they would be permanent staff of the Water Court) and their services could be

used by any of the Water Court judges on an as-needed basis. Presumably, under this approach, the commissioners would be housed either at the location of the central Water Court or one of the regional offices but could travel to the locality of a case as needed in the same manner as would the judges. A second approach would be to empower the Water Court judges with authority to appoint commissioners and other court staff on a case-by-case basis. Under this approach, the commissioner would not necessarily be housed at the location of the central Water Court or one of the regional offices. Instead, the commissioner might reside in the venue of a particular case. The first option would probably better serve the value of developing and utilizing expertise. The second option would probably better serve the value of keeping the court connected to the locality of the dispute. A third option would be for the Task Force not to identify a specific option for appointing court staff but instead to include in its report a statement that it would be expected that the Water Court could appoint and utilize commissioners in the same manner as does the Superior Court. *See* RCW chs. 2.24 and 4.48 (for commissioner and referee appointments) and CR 53.3 (for special master appointment).

Any estimate of the budget associated with the creation and operation of the Water Court should include costs associated with all court staff, including commissioners, special masters, referees, and other staff.

Funding. The Water Court should be funded by a combination of public funding and fees paid by litigants. Because a court (even a specialized court) is a public entity, the subcommittee believes the large majority of the funding should be public. The subcommittee believes this portion should be state funded (not local funded).

A small portion of the court's funding should come from litigant fees. The subcommittee recommends that a statutory fee schedule be established by the Legislature at a range equal to or similar to the current fees of \$250 to initiate a lawsuit and \$25 to file a claim. The fee schedule could identify one fee for participants in an adjudication and another fee for participants in an appeal of an Ecology Water Right decision. Under any fee schedule approach, the Legislature should include incentives for early resolution, such as reduced fees for participants that resolve their claims early in the process and/or without the need for a contested court hearing.

Appendix

H

This appendix represents the work of a subcommittee of the Task Force. The Task Force did not discuss any of the details contained in this paper during any of its Task Force meetings. Without necessarily endorsing the specifics of this concept, the Task Force includes this paper as an appendix to its report to document the work of its subcommittee.

*September 12, 2003
Revised Draft*

**“SECOND CHOICE” ALTERNATIVE TO CREATING WATER COURTS:
Creating a State-Wide Pool of Experienced Special Judicial Water Commissioners
to Assist Superior Court Judges with General Adjudication Hearings and other Water
Resources Cases**

Introduction and qualifications regarding this recommendation

This draft paper is provided by a subcommittee of the Water Rights Disputes Task Force to the full Task Force for consideration at the September 30, 2003 Task Force meeting. The subcommittee recommends that the full Task Force endorse this alternative as a “second choice” alternative to its primary recommendation for a Specialized Water Court.

The concept of developing a second-choice alternative was discussed at the Task Force’s meeting on July 24, 2003. Providing a second-choice alternative would give policy-makers another option should they determine the primary recommendation is not feasible. Unlike the Specialized Water Court option, this “second-choice” alternative would not require an amendment to the state constitution.

In the context of both its Specialized Water Court recommendation and this “second-choice” option, the subcommittee recommends the following statement setting forth some basic caveats. The subcommittee recommends that the final report of the Task Force include the following language as part of its recommendation of this option:

In assessing possible new structures for processing disputes involving water rights, particularly disputes that are currently only resolved through conducting a general adjudication, the Task Force identified two new structures that might be used to address these disputes: (1) a specialized Water Court; and (2) an Office of Water Commissioners. Whether the Legislature invests in the creation of either of these new structures depends in large part on whether a sufficient need for these services exists. Preliminary input from the Department of Ecology indicates that there is a significant need for adjudications throughout the state. Currently there are 74 petitioned adjudications on which the department has not acted by initiating a new adjudication. These petitions cover basins across the state. In addition, the department is aware of other basins where conflicts involving water usage regularly arise, suggesting even more need for a commitment of state resources to undertake a significant adjudications effort.

The Task Force does not view itself as an entity with sufficient expertise or qualifications to recommend this kind of commitment by the state. The Task Force recommends that the Legislature engage in a discussion of this topic with a goal of making a determination of whether there is a need for the state to embark on a program to adjudicate a substantial number of basins within the state. The Task Force recommends that the Legislature receive input from a broad group of interested and affected entities before making its determination.

Assuming the Legislature determines a need to adjudicate a substantial number of basins in the state, the Task Force has developed two structures that could assist in this effort. The first structure, a specialized Water Court, was discussed in a prior paper. The second structure, an Office of Water Commissioners, is discussed in this paper.

Assuming the Legislature determines a need to adjudicate a substantial number of basins in the state, the Task Force recommends the creation of an Office of Water Commissioners only if there is adequate funding for its operation. The Office must be set up such that it will operate separate from the general superior courts and be funded separate from the superior courts. The Task Force does not support placing new responsibilities on the existing superior courts without adequate funding.

Summary—State-Wide Pool of Judicial Water Commissioners. Under this alternative, the statutory process for general adjudication would be kept largely as-is – a general adjudication case would still be heard by a local superior court judge. The innovation under this alternative is that the State Supreme Court would create an Office of Water Commissioners. For individual water cases, the superior court judge assigned to the case could draw on one of these commissioners to assist the superior court judge with the case. The superior court judge would still have ultimate responsibility for all aspects of the case. The judicial water commissioners would be employed by the Office of Water Commissioners on an on-going basis, and would be expected to work on multiple water cases at any given time. This would mean that the experience each commissioner acquired could be drawn on in subsequent cases.

Rationale for the Proposal. This proposal is intended to enhance judicial expertise in water right cases while maintaining the existing structure of superior courts, including the existing general adjudication process. This proposal should be easier to implement than the recommendation to create specialized water courts because it would not require a constitutional amendment or the creation of an entirely new court.

Appointment of Judicial Water Commissioners/Assignments of Particular Water Commissioners to Provide Assistance on Individual Cases. The judicial water commissioners would be appointed by the Supreme Court to the Office of Water Commissioners. The services of the water commissioners would be drawn on by the superior court judges on an on-going basis, so that their expertise could be carried over from case to case. Appointment to the Office of Water Commissioners could either be indefinite or for a specific term (with a review process to determine reappointment for another term). Assignments of a particular commissioner to a particular case would be done on a case-by-case basis by the superior court judge requesting assistance. When the need for a new assignment arose, the administrator of the Office of Water Commissioners would identify to the requesting judge which commissioner(s) were available and had the capacity to provide assistance in a new case and then the requesting judge would make a formal designation “assigning” the commissioner to the case.

Qualifications of Judicial Water Commissioners. The minimum qualifications for judicial water commissioners would be the same, or nearly the same, as those decided on for water court judges: a mandatory requirement of 5 years as an attorney and a list of desirable qualifications such as experience in water law or related environmental areas and/or experience in a judicial or quasi-judicial setting. The requirement of five years practice as an attorney, or something along these lines, is important given that evidentiary hearings in water adjudications

are governed by the rules of evidence. Based on its determination of projected workload, it is expected that the Legislature will determine how many commissioners should be appointed to the Office of Water Commissioners. Once the number is determined, appointments should aim to make the residence of commissioners roughly proportionate to the projected proportion of casework coming from each geographic region of the state. *I.e.*, If it is expected that roughly half of the new adjudication work will originate in eastern Washington, then half of the commissioners should be appointed from eastern Washington candidates. Assuming there are at least three commissioners appointed initially, at a minimum at least one commissioner should come from each of the three geographic regions representing the three court of appeals divisions.

Role of Judicial Water Commissioner. This is an important issue. If too much authority is given to the judicial water commissioners, then it undermines the interest in having a local decision-maker (the judge) who is responsible to the local electorate. If too little authority is conferred, then the advantage of acquired expertise is lessened and the judges' workload can become excessive. The effect on the judges' workload becomes even more significant depending on whether the judge is responsible for other cases in addition to the general adjudication.

In an attempt to strike an appropriate balance to address these issues, the subcommittee recommends that the judicial water commissioner have the authority to act in any water case in the same capacity as the judge. In general, the water commissioner would have those powers listed in RCW 2.24.040 (provided to superior court commissioners) applicable to his/her work on a water case. In an individual case, the assigned judge would determine what responsibilities to give to the commissioner. This could include authority to hold evidentiary hearings to determine the facts underlying individual and multiple claims and authority to issue decisions for the court, including decisions on both factual and legal issues. As with superior court commissioners, decisions of the water court commissioner would become the final decision of the court unless they were the subject of a motion for revision filed with the judge pursuant to RCW 2.24.050. The "revision" option should ensure that the local judge will have the final say on all decisions in every case.

Local Administration of General Adjudications. Although a specialized water court would be centrally located in many aspects, the second-choice alternative would involve primarily local administration in that the judge with ultimate responsibility in the case would be a local superior court judge and the case administration would be handled by the local superior court staff.

The local focus would simplify the sharing of information within the particular case (filing of claims, pleadings, and exhibits, etc. would all be handled locally). However, to the extent that information sharing among different courts hearing different adjudications serves to facilitate development of expertise and consistency in decisions, the local focus would be more of an obstacle. However, it would be expected that the water commissioners would consult with one another to facilitate the sharing of expertise across cases.

Authority to Appoint Special Masters, Referees, and other Court Staff. In addition to being able to draw on the services of a Water Commissioner, judges assigned to a water case would have the same powers as do other superior court judges to appoint special masters, referees, and other court staff to assist them in handling their water cases. *See* RCW chs. 2.24 and 4.48 (for referee appointments) and CR 53.3 (for special master appointments).

Judicial Water Commissioners — Role in “PCHB Cases” Assuming the Legislature creates an Office of Water Commissioners to assist in adjudications, the same commissioners could be available to assist in providing review services for water right cases that currently go through the PCHB.

The subcommittee recommends to the full Task Force that it adopt a variation on two options involving review of Ecology water right decisions selected during the July Task Force meeting. Under the subcommittee’s recommended variation, a person aggrieved by an Ecology water right decision would be given the option of filing his/her appeal of the Ecology decision at the PCHB or at the local superior court. If the appeal was filed directly at the local superior court, the assigned judge would determine whether the case should stay at the court for a *de novo* evidentiary hearing or whether it should be sent to the PCHB for a *de novo* evidentiary hearing. Whenever an appeal of an Ecology water right decision was heard by the PCHB (either because the Appellant initiated the appeal at the PCHB or because the superior court referred the case to the PCHB), the decision of the PCHB could be appealed to the superior court, which would consider the appeal pursuant to APA judicial review provisions. Under this model, when the superior court retained one of these cases for an evidentiary hearing or when the court did not retain a case but the case came to it on appeal from the PCHB, the court could seek the assistance of a water commissioner.

The subcommittee recommends that the court’s decision of whether to retain a case filed directly with the court or send it to the PCHB for an original hearing should be governed by the following non-exclusive list of factors:

- Whether the unique resources of the PCHB (*e.g., ability to provide procedural assistance, ability to provide mediation services free of charge*) would benefit the parties in this case;
- Status of the parties;
- Type of dispute;
- Complexity of the issues;
- Projected size of the case;
- Potential for participation by multiple parties.

Anticipated Workload. As noted above, the judicial water commissioners would assist with general adjudications as well as on cases involving appeals from Ecology water right decisions.

General Adjudications Workload. To manage the general adjudication workload, the Department of Ecology would prepare a proposed list of adjudications to be conducted throughout the state. This proposed list would be submitted to the Legislature. The Legislature would develop a final list setting out a ranking for the priority and sequence of the adjudications. The Legislature would also identify the source of the funding that would allow for timely implementation of the listed adjudications. The Legislature would consider the capacity of the water court commissioners when setting the schedule for new adjudications workload of the superior courts.

Appeals from Ecology Water Resources Decisions Workload. If the role of the PCHB is retained, as under Option F (July task force meeting), it is projected that approximately 10 APA-styled appeals of PCHB water right decisions would be filed each year.

If the role of the PCHB is eliminated, as under Option G (July task force meeting), and the superior courts handle *de novo* evidentiary hearings of appeals from Ecology water right decisions, it is expected that the superior courts would hear approximately 85 of these cases per year. As noted above, the water commissioners could be used to reduce some of the superior court workload impact of these cases.

If the PCHB can be skipped over at the election of appellants (new variation recommended by the subcommittee), it is impossible to project the superior court (and corresponding commissioner) workload for this category of cases other than to say it would fall somewhere between 10 and 85 cases a year.

It should be noted that the expected costs to the public of this proposal would be more than just the expenses incurred by the new judicial water commissioners. In the counties where general adjudications are begun, the superior courts, county clerks, and other staff would have significantly higher workloads. In addition, an increase in the volume of adjudications work throughout the state would mean an increase in associated staffing at the Department of Ecology and the Attorney General's Office.

Funding. The Office of Water Commissioners could be funded through a combination of public funding and fees paid by litigants. For funding of the specialized water court option, the subcommittee recommended that the large majority of the funding should be public and the public funding should be state funded (not local funded). The same recommendation could be made for funding the Office of Water Commissioners.

In the context of the specialized water court, the subcommittee determined that a small portion of the court's funding should come from litigant fees. This recommendation could also be made for the funding of the Office of Water Commissioners. The Legislature could establish a statutory fee schedule at a range equal to or similar to the current fees of \$250 to initiate a lawsuit and \$25 to file a claim. The fee schedule could identify one fee for participants in an adjudication and another fee for participants in an appeal of an Ecology Water Right decision. Under any fee schedule approach, the Legislature should include incentives for early resolution, such as reduced fees for participants that resolve their claims early in the process and/or without the need for a contested court hearing.

Appendix

I

Water Court Assumptions:

Estimates are based on 2003 fiscal note assumptions with some modifications for water court scenarios.

Administration Staffing:

2.4 staff per judicial officer used in 2003 fiscal notes.

1.4 per judicial officer used for this estimate as 1 court reporter FTE not included (electronic recording).

Clerk's Office Staff:

4 staff per judicial officer used in 2003 fiscal notes and assumed for the water court scenarios.

Salary/Benefits:

Commissioner salary/benefits assumed to be at 90% of judge salary/benefits.

Administrator salary assumed to be \$95,000 + 23% benefit rate (salary based on recent survey)

Courtroom Facilities:

Courtroom space is provided for each judge.

Commissioners will share courtroom space with judge.

Approximately 2 days per week commissioners will need additional courtroom space - conference room

Assumed 48 week year.

Assumed \$300 per day per conference room.

Square footage per judge does not include usual jury room or court reporter space.

Operational Costs:

2003 rate includes such costs as jury and indigent defense which water courts would not have.

However, same rate is used as water courts will incur other unusual expenses related to multiple court s

Water Court Estimated Costs - 4 judges and 2 commissioners

Salary Costs	FTEs	Rate	Total Sal/Ben	Totals
Judges	4	\$139,544	\$558,176	
Commissioners	2	\$125,590	\$251,179	
Admin staff (1.4 per jud off)	8.4	\$69,775	\$586,110	
Clerk's staff (4 per jud off)	24	\$41,582	\$997,968	
Court Administrator	1	\$116,850	\$116,850	
Transcriptionist	1	\$69,775	\$69,775	\$2,580,058
Total FTEs	40.4			

Operational Costs	FTEs	Rate	Op Costs	
Per Jud Off	6	\$236,859	\$1,421,154	
Per Clerk staff	24	\$6,263	\$150,312	\$1,571,466

Judge/Staff Capital Costs	FTEs	Sq Ft/FTE	Cost	Capital Costs	
Judges courtroom/chambers	4	1450	\$165	\$957,000	
Comm chambers	2	250	\$165	\$82,500	
Staff offices	34.4	120	\$165	\$681,120	
Computers/furniture	40.4		\$10,000	\$404,000	
Recording equipment/courtroom	4		\$20,000	\$80,000	\$2,204,620

Commissioner Facility Rental	FTEs	Days/yr	Cost/room	Fac Rental	
Conference room rental	2	96	\$300	\$57,600	\$57,600

\$6,413,744 Year 1
\$4,209,124 Year 2

Water Court Estimated Costs - 3 judges and 1.5 commissioners

Salary Costs	FTEs	Rate	Total Sal/Ben	Totals
Judges	3	\$139,544	\$418,632	
Commissioners	1.5	\$125,590	\$188,384	
Admin staff (1.4 per jud off)	6.3	\$69,775	\$439,583	
Clerk's staff (4 per jud off)	18	\$41,582	\$748,476	
Court Administrator	1	\$116,850	\$116,850	
Transcriptionist	1	\$69,775	\$69,775	\$1,981,700
Total FTEs	30.8			

Operational Costs	FTEs	Rate	Op Costs	
Per Jud Off	4.5	\$236,859	\$1,065,866	
Per Clerk staff	18	\$6,263	\$112,734	\$1,178,600

Judge/Staff Capital Costs	FTEs	Sq Ft/FTE	Cost	Capital Costs	
Judges courtroom/chambers	3	1450	\$165	\$717,750	
Comm chambers	1.5	250	\$165	\$61,875	
Staff offices	26.3	120	\$165	\$520,740	
Computers/furniture	30.8		\$10,000	\$308,000	
Recording equipment/courtroom	3		\$20,000	\$60,000	\$1,668,365

Commissioner Facility Rental	FTEs	Days/yr	Cost/room	Fac Rental	
Conference room rental	1.5	96	\$300	\$43,200	\$43,200

\$4,871,864 Year 1
\$3,203,499 Year 2

Water Court Estimated Costs - 2 judges and 1 commissioner

Salary Costs	FTEs	Rate	Total Sal/Ben	Totals
Judges	2	\$139,544	\$279,088	
Commissioners	1	\$125,590	\$125,590	
Admin staff (1.4 per jud off)	4.2	\$69,775	\$293,055	
Clerk's staff (4 per jud off)	12	\$41,582	\$498,984	
Court Administrator	1	\$116,850	\$116,850	
Transcriptionist	1	\$69,775	\$69,775	\$1,383,342
Total FTEs	21.2			

Operational Costs	FTEs	Rate	Op Costs	
Per Jud Off	3	\$236,859	\$710,577	
Per Clerk staff	12	\$6,263	\$75,156	\$785,733

Judge/Staff Capital Costs	FTEs	Sq Ft/FTE	Cost	Capital Costs	
Judges courtroom/chambers	2	1450	\$165	\$478,500	
Comm chambers	1	250	\$165	\$41,250	
Staff offices	18.2	120	\$165	\$360,360	
Computers/furniture	21.2		\$10,000	\$212,000	
Recording equipment/courtroom	2		\$20,000	\$40,000	\$1,132,110

Commissioner Facility Rental	FTEs	Days/yr	Cost/room	Fac Rental	
Conference room rental	1	96	\$300	\$28,800	\$28,800

\$3,329,985 Year 1
\$2,197,875 Year 2

Appendix

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Expected Efficiencies Resulting from the Alternatives Proposed by Streamlining the Water Rights General Adjudication Procedures

A Report Issued by
Washington Department of Ecology
and
Office of the Attorney General

The “Streamlining the Water Rights General Adjudication Procedures” report was delivered to the Washington State legislature in December 2002. The current report addresses the impacts in terms of staff, court and claimant time, reduction of claims, and costs associated with the implementation of the alternatives proposed in that document.

It is not possible to specifically quantify the time and cost savings for the nine strategies offered in the Streamlining Adjudications report, since adjudications vary greatly depending on the size of the area, number of water sources, number of claims, available documentation, and so on. It should also be noted that there is little correlation between the duration of the adjudication and the cost associated with the case. The actual costs are dependent upon the amount of activity, both formal and informal, that occurs. So, for this report, Ecology looked at each strategy in light of expected efficiencies instead of specific costs.

In order to have a baseline to work from, Ecology examined five previous evidentiary hearings conducted by adjudicative court Referees. These five were selected because they are relatively recent, and because they represent rural as well as suburban areas of water use.

The five evidentiary hearings were for Adjudications of the:

- Little Klickitat River Drainage Basin (excluding the waters of Blockhouse Creek and Mill Creek);
- Surface and Ground Waters of the Wolf Creek Drainage Basin;
- Waters of the Duck Lake Ground Water Management Area;
- Surface Waters of the Yakima River Drainage Basin; Subbasin No. 1 (Cle Elum River); and
- Surface Waters of the Yakima River Drainage Basin, Subbasin No. 31 (Richland).

The following table summarizes the basic information of the evidentiary hearings conducted to produce the Reports of Referees. The table will be referred to in the subsequent discussions of the potential efficiencies represented by each of the alternatives.

Table 1. Summary of Claim Activity in Five Adjudications

Adjudication	No. of total Claims	No. Claimants appearing at hearing	No. of Rights Confirmed	No. of Denials of entire Claims	No. of Ecology Recommendations made for Claims	Duration of case (in months)	No. of State Certificates within Adjudication area	No. of Certificates of Change within Adjudication Area
Little Klickitat	155	119	98	85	0	76	33	5
Wolf Creek	37	8	8	30	0	156	2	0
Duck Lake	134	120	124	36	0	68	29	5
¹ YRDB Sub 1	26	2	15	11	12	*	17	1
¹ YRDB Sub 31	63	37	29	38	12	*	15	0
Average	69	48	46	33		100	16	2
Total	415	286	274	200	24		96	11

Several clarifications should be made here regarding this paper as a whole. First, as used within this document, “claim” refers to a claim filed with a superior court to become a party to an adjudication and to defend a water use. Authority for water use can be reflected by a 90.14 claim (see below), a permit, a certificate, a federal reserved right, or a permit exception. The term “RCW 90.14 claim” is used within this document when referring to a Statement of Claim filed in the state water right claim registry. A water right claim is intended to document an assertion to a water right that pre-dates permit requirements (1917 for surface water, 1945 for ground water).

Secondly, it is good to remember that while this document only considers the direct costs of an adjudication, there may be additional costs to claimants. Since the initiation of an adjudication places all included water rights in doubt, it may be difficult to obtain approval for loans to fund the planting of crops, for example, or for building when water rights associated with the land are being adjudicated. Property sales are more difficult since it may not be realistically appraised when the water rights are in question.

Finally, it should also be noted that the nine strategy recommendations included within the original report complement each other, and when implemented together increase the effectiveness of each. Efficiencies will usually be increased by implementing different strategies simultaneously, rather than one at a time. For instance, Strategy No. 1 (Ecology to Make Tentative Determinations – Claimants to Present Fully Documented Claims at the Outset) is more easily implemented if Strategy No. 4 (Ecology to Provide Comprehensive Background Information Early in the Proceedings) is also implemented. Strategy No. 8 (Expand the Use of Mediation) furthers the objectives associated with Strategy No. 1 and Strategy No. 4, as well as others.

The remainder of this paper reviews each of the nine strategies individually. A summary of the alternative is presented first, and then a discussion and the conclusions on efficiencies.

¹The Adjudication of the surface waters of the Yakima River Drainage Basin was filed during 1977 and is ongoing. The Report of Referee for Subbasin 1 was issued June 15, 1988; the Report of Referee for Subbasin 31 was issued October 25, 1991.

Strategy 1: Ecology to Make Tentative Determinations – Claimants to Present Fully Documented Claims at the Outset

This strategy encompasses two recommendations. The second part must be fulfilled in order for the first part to be possible, so having claimants present fully documented claims is examined first.

Claimants to Present Fully Documented Claims at the Outset

Ecology does not routinely meet with the claimant until field investigations are conducted within the adjudication area. This can be a significant time after claims have been filed with the court.

This part of the strategy requires that the claimant and Ecology meet *prior* to the filing of a claim to the court by the claimant. Ecology and the claimant would share documentation. If additional information is needed, the claimant would be responsible for obtaining it within a reasonable period. Through meetings with claimants, Ecology could assist in the filing of an adequate claim and assist in resolving issues concerning the filing of claims involving several parties or overlapping interest between parties.

Conclusion

Court time is expensive for the state and for the claimants. By facilitating the presentation of valid, well-documented claims at hearings, considerable dollars would be saved. Based upon the data in Table 1, it is estimated that 10% of all claims filed with the court in the sampling could be avoided if potential claimants were to meet with Ecology prior to the filing with an adjudicative court.

Ecology to Make Tentative Determinations

The first part of Strategy 1 proposes that Ecology review all supporting documentation at the outset of an adjudication and perform the initial determination on the validity of water rights. It is estimated that through the proposed process of having claimants prepare complete documentation at onset, Ecology could make recommendations on as many as 80% of all claims.

Applying the 80% figure to the five adjudications summarized in Table 1, Ecology would have recommended 200 claims for approval. Assuming that nearly all (say, 90%) of the claimants who received a favorable recommendation would not file an objection, the court would have been saved the burden of holding hearings for 180 claims. Resolving those claims prior to hearing would save the court approximately 20 days of hearings, along with countless days of evaluation.

Ecology would probably be more cautious in recommending denials than approvals, to ensure that each claimant has every opportunity to present their case for approval. Further, it is assumed that about 70% of the claimants receiving a denial would be satisfied with the decision and not proceed further. (The 70% assumption is based upon the approximate rate at which appeals of denials issued through Ecology's administrative permitting functions are appealed to the Pollution Control Hearings Board – PCHB.)

It is estimated that nearly half of the total claims denied by the court would also be denied by Ecology, on a purely factual basis. Therefore, the court's burden would be reduced to dealing with only about half of the denials, ones that are predominantly legal in nature. Based upon Ecology's estimates, the total savings of the 200 denied claims in the sample would have been 97 claims, saving expenses and about ten days of evidentiary hearing along with the evaluation of those claims.

This strategy shifts costs to the beginning of an adjudication and shifts costs from the court to Ecology. A net saving should be realized through the rapid resolution of claims and the reduction of duplicative effort as Ecology and the claimants each separately investigate claims later in the adjudicative process.

Conclusions:

- 1) In total, the implementation of Strategy 1 might have saved the court 30 days of claimant hearings (involving 277 claims) that occurred because this strategy is not in place. There would be additional savings on staffing costs and administrative costs made at public expense.
- 2) By Ecology identifying the relevant claims in a case up front, the duration (averaging 100 months in three sampled adjudications) and cost (a million dollars a year, based on Acquavella) of a future adjudication would be greatly reduced.
- 3) Ecology estimates that recommendations could be provided to the court for the approval of as much as 80% of those court filed claims that would eventually be affirmed by the court.
- 4) Ecology estimates that recommendations could be provided to the court for denial of at least 50% of those claims that would eventually be denied by the court.

Strategy 2: Create a New Process for Ecology to Validate Registered 90.14 Water Right Claims

This proposal suggests a means to resolve RCW 90.14 claims² of questionable validity and extent, absent a general adjudication or a means to clarify the record prior to an adjudication being conducted. As with Strategy 1, Ecology would meet with the property owners of the claimed right to discuss the validity of the RCW 90.14 claim and share documentation. If additional information was needed, the property owner(s) of the claimed right would be responsible for obtaining such documentation within a reasonable timeframe.

In the five adjudication hearings sampled, certificates of water rights and certificates of change represented only 26% of the claims filed with the court. (The relationship of each state certificate and the claims heard was not researched.) At least 74% percent of the claims filed with the court were based on RCW 90.14 claims or on permit exempt use of ground water as authorized by RCW 90.44.050. Generally, water rights based upon a state issued certificate are easier to resolve than those that are not. Without a state water right document, there is no single source of record for the origin, development, and legal

² "90.14 claims" refers to Statements of Claim documenting a water right within the state water right registry.

basis for the water use. County, state, and federal records must be researched to create evidence to support the claim.

This alternative would allow quick administrative processes with the opportunity to appeal to the PCHB as a means of clarifying the record based upon water right claims, thus reducing the duration and cost of adjudications.

There are approximately 169,000 RCW 90.14 claims registered with the state. Many of those RCW 90.14 claims, filed in or prior to 1974, do not represent the present water use under the water right.

Conclusion

Administratively addressing many of these water uses would reduce the duration and cost of the formal adjudication process. It is difficult to quantify efficiencies because of the complexity of many of these undocumented claims. And, the longer adjudications are delayed, the more complex the process is likely to be since it becomes progressively harder to get good documentation.

Strategy 3: Allow Limited Special Adjudications

Washington law currently only provides for adjudications to cover water rights for an entire water source or basin. While general adjudications are an effective means of determining the extent and validity of all such rights, they are not as useful a tool for resolving disputes among a limited number of claimants or for stream reaches or limited ground water areas instead of entire basins.

The public cost of conducting an adjudication the size of the surface waters of the Yakima basin (with approximately 2,500 claims to rights) is about one million dollars annually (dividing the total cost by the number of years). Utilizing limited adjudications could reduce the number of claims to be investigated and to be heard by the court, which would likely reduce the number of issues to be resolved. This will create substantial savings.

Ecology would obtain an additional tool for resolving water related controversy through this strategy. Many adjudications conducted within the past 30 years did not include federal reserve water rights and could have been conducted as limited adjudications.

Conclusion

Limited adjudications would increase efficiency and reduce cost by focusing the process on the issues that require resolution by the court and only involving parties interested in a particular controversy.

Strategy 4: Ecology to Provide Comprehensive Background Information Early in the Proceedings

Ecology presently does not provide comprehensive background information until the commencement of the hearing process, which can occur a significant period of time after

filing for an adjudication. This proposal shifts much of the research work that is performed later in the adjudication process to the beginning of the process. As a result, there would be a greater cost in the initial preparation of the adjudication but greater savings later in the adjudication.

If this alternative was adopted, most of the research, available documentation, and the initial evaluation of the documentation would be compiled by Ecology early in the process and made available to all parties. (Individual property title search would still be the responsibility of each claimant.)

Savings would be created by reducing the burden on record-holding entities to respond to numerous duplicative requests for public records. There would be savings created by assisting claimants in researching the factual background of their water rights, since claimants could submit an accurate water right claim to the court. The court would, early on, be provided with most of the information it would require to have a comprehensive understanding of the factual circumstances related to the area being adjudicated.

Conclusions:

- 1) An adjudication would be more efficient if there was a quick production of the most relevant information. This would allow for quicker filing of claims, scheduling of hearings, and accurate rulings of the court.
- 2) Local, state or federal agencies would be less impacted if the number of inquiries (often duplicative requests for public records) was reduced.

Strategy 5: Authorize Pre-Filed Testimony

Although the current procedural authority, at times, allows specific claimants to pre-file testimony because of witness availability, there are no clear provisions authorizing this process other than the use of legal depositions. Depositions are expensive, requiring the time of attorneys, Ecology and court staff, and claimants.

A typical claim may take ½ hour to present at hearing, while complex claims may take several hours. Pre-filed testimony could significantly reduce the time necessary for court hearings of claims and could provide additional information to the court process that would be valuable in providing recommendations for the confirmation of rights.

While one may testify to information that applies to several claims filed with the court, typically each claimant is expected to appear and testify to their current and historical water use practices. The five sampled adjudications represented 31 days of hearings at an average rate of seven claimants testifying per day. Pre-filed testimony would reduce the burden placed upon claimants to appear and would reduce hearing time.

Conclusions:

- 1) The duration of the hearings phase of an adjudication may be shortened and made more efficient resulting in a cost savings and quicker progress toward the evaluation of claims by the court.
- 2) An early record could be made of the information known by “old timers.”

Strategy 6: Utilize Information Technology More Efficiently

The expansion of information technology within the adjudication process can produce substantial time savings through:

- the automation of routine court processes and documents;
- better tracking of claimants and claims, by mapping the water rights and connecting them with county parcel information;
- production of high quality maps and digital photographs; and
- satellite imagery.

Upon completion of an adjudication, information systems can serve as the tool for maintaining information in an easy-to-update format, providing easy access to pertinent documentation. It thus serves as a means for permanently preserving evidence.

GIS based maps could reduce the time necessary for the field investigation of claims. A field investigation of a single claim typically requires 1-3 hours. By using GIS to display relevant information for the investigator and the claimant, the investigation time should be reduced by about 50%. The reduction in the time required for the investigation would result from a reduction in data to be collected. Information typically located by the investigator (property boundaries, points of diversion, irrigated areas, farm roads, spring and stream locations) could be identified in advance and merely verified by the investigator.

Conclusions:

- 1) Through the automation of many court processes and reliable access to data once collected, an adjudication and the administration of adjudicated water rights can be more efficient.
- 2) Information technology can be employed at many phases of an adjudication, and can provide a detailed record of a case for lasting understanding of the rulings of the court and an historical record of the properties involved. This information in turn will save time in future administrative activities, such as making changes to certificates and ensuring compliance.

Strategy 7: Develop Aerial Photograph Interpretation Expertise

A substantial body of the information required by an adjudicative court is available through aerial and satellite photography. This information includes property boundaries, points of diversion, irrigated areas, distribution systems, water sources, and buildings and roads. By extracting available information, Ecology reduces the requirement to use staff for field investigations and creates an information base that is available to claimants. To efficiently use photography, Ecology needs to continue to develop the expertise within its staff.

Conclusions:

- 1) The accuracy and efficiency of an adjudication can be increased through the collection of existing information from aerial and satellite photography and interpretation depicted maps and acreage data.
- 2) The cost of an adjudication would be reduced through the reliance of photography rather than employing staff to visit every place of water use associated with claims.
- 3) Ecology staff should have on-going training in order to remain up-to-date, to better serve the adjudication process.

Strategy 8: Expand the Use of Mediation

Currently, mediation or other alternative dispute resolution is not formally encouraged in the adjudication process. Mediation could be used to resolve specific issues among parties to an adjudication or to resolve claims entirely. It would complement Strategy 1, assisting in making recommendations to be advanced to the court. The cost of outside mediation sources is expensive, but state expertise could be developed through training.

Conclusion

Mediation resulting in the settlement of issues or of claims would reduce costs by eliminating issues to be decided by the court.

Strategy 9: Develop Guidance on How to Maintain and Document a Water Right

Currently, very little guidance is available to claimants on the preparation and presentation of their claims in an adjudication. The adequate documentation of water use and the historic development of a water right is a significant problem encountered during an adjudication. Support of a claim filed with a court, the ability of Ecology to recommend that a water right be confirmed, and the affirmation of a water right by the court are all dependent upon the evidence provided in support of the claim. Providing extensive public education may reduce the controversy that leads to adjudication. Once an adjudication is initiated, the process is expedited by an efficient production of factual data.

Conclusions:

- 1) Informed water right holders who have retained important water use information would be better prepared to participate in an adjudication, improving the efficiency of the adjudication process.
- 2) The costs of the adjudication associated with delays and the hearing of arguments not consistent with basic water law principles may be reduced through a better educated public.

Appendix

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Water Rights Adjudications

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Distributed separately:

1. Map: Number of water right permits, claims and certificates by watershed, with pending adjudication petitions
2. Map: Number of pending applications for new water rights and water right changes, with current tribal reservations and treaty ceded areas

Reasons for Water Right Adjudications

1. To quiet title of all vested water rights (a job to be done last century)
2. To provide certainty of rights and certainty of water to water users
3. To protect senior rights from impairment (and, where needed, to be able to regulate junior rights with certainty and authority)
4. Protect rights currently held in and/or for the stream
5. To determine water availability (and to prevent hoarding and speculation with water)
6. To make decisions on pending applications for new water rights
7. To support water marketing and water right changes and transfers (to protect consumers and rate payers; to enhance the value of rights through increased certainty)
8. To ensure that the water right record is current and to develop a water budget for management of water in the basin

Adjudication Workload ~ Geographic Distribution of the Work

Completed Adjudications

There are 82 completed adjudications, decrees rang from 1918 to 1990

Many are incomplete (mainstem diverters only, no ground water, sometimes no federal/tribal rights). Many are obsolete (no upkeep).

Pending Adjudications

There are 6 adjudications that were started, but remain incomplete, with start dates ranging from 1921 through 1980.

There are 74 pending adjudication petitions; with filing dates that range from 1912 to 2000.

33 of these are from Central Regional Office
24 of these are from Eastern Regional Office
16 of these are from Southwest Regional Office
5 of these are from Northwest Regional Office

(A few of the petitions involve more than one region.)

Unadjudicated Claims

There are approximately 170,000 unadjudicated water right claims on file with the state. These are distributed across the state -- there are unadjudicated claims in every watershed.

Over 95,000 of the claims are in Western Washington, where most watersheds have several thousand claims each.

(See the map of claims and pending petitions.)

Adjudication Workload ~ Adjudication Process and Workload Factors

Adjudication steps include:

1. Petition (or state initiated action)
2. Case development and filing
3. Notice and summons
4. Filing of claims
5. Field investigation and mapping
6. Prehearing conference
7. Evidentiary hearings
8. Report on hearing
9. Post-hearing briefings
10. Exceptions (filings, hearings, responses)
11. Report on exceptions
12. Supplemental report (and second supplemental report, if needed)
13. Appeals, remands
14. Conditional final and final orders (decree)
15. Superceding certificates, archiving
16. Compliance (watermasters/stream patrols, monitoring, enforcement)

(Plus a constant flow of motions – to join, change status, late claims, etc. Acquavella sees “a foot of paper” each month – printing and mailing costs for the case were \$170,000 last biennium.)

Some reasons for the heavy workload of an adjudication:

- Evidence goes back to 1870’s; hearsay evidence is admissible
- Water rights are fact-driven; and require consideration of technical information and hydrological models
- Multiple parties, often hard to find, often arriving late, many unrepresented
- Much of the water code is case law (and is not codified in statute)
- Exceptions and appeals are common
- The authorizing environment is mixed (cases are affected by external proceedings)

Adjudication Workload ~ Roles in an Adjudication

The assigned Superior Court judge allocates the work of an adjudication:

- Leave it all to the Referee
- Have the court do all the work (decisions written by judge or clerks)
- Some combination

The Yakima adjudication is a combination:

- The 31 subbasins were left to the Referee (22 at Conditional Final Order)
- The 36 major claimants were kept by the Court (19 are at CFO)

There are 7 court staff involved in the Yakima Adjudication Court:

- The Judge has two staff:
 - ✓ A commissioner (full time) (holds hearings, bench rulings, writes decisions)
 - ✓ A clerk of the court (about half time on the adjudication)
- The Referee (full time) has three full-time staff:
 - ✓ One senior person dedicated to the subbasins proceedings
 - ✓ Another senior person dedicated to the major claimants proceedings
 - ✓ An administrative assistant
- Judge was full time earlier in the adjudication – now is half time, given stage of the case and experience of the commissioner.

There are 7 Ecology staff dedicated to the adjudication

The AG's Office dedicates the equivalent of 1 full-time attorney to the adjudication

Funding is also provided for a private court recorder and a private mediator.

There are around 2000 individual claimants participating in the adjudication, representing around 40,000 water users.

**Adjudication Workload ~
Costs of the Yakima Adjudication**

Ecology's Adjudication Unit	\$ 847,000 per biennium
Referee's Office	\$ 717,000 per biennium
Ecology indirect costs	\$ 490,000 per biennium
Attorney General	\$ 410,000 per biennium
Ecology/Yakima County contracts	\$ 436,000 per biennium
Yakima Superior Court (estimate)	\$ 735,000 per biennium
TOTAL	\$ 3,635,000 per biennium

[NOTE: Historical costs for Acquavella are estimated at an average of \$2 M per biennium since the initiation of the adjudication in 1977.]

Adjudication Plan ~ Factors in Selecting the Next Adjudication

Petitions

- ✓ Pending historical petitions
- ✓ Statutory priority to any petitions filed by watershed planning units

Needs

- ✓ Limited water availability
- ✓ Large backlog of pending applications
- ✓ Active water marketing

Conflicts

- ✓ Need for regulation of rights, enforcement, etc.
- ✓ Growth and economic needs
- ✓ Instream flow needs
- ✓ Unresolved/unrecognized federal/tribal rights
- ✓ Endangered species/water quality issues
- ✓ Filings in federal court

Workload

- ✓ Resources at Ecology, AG's Office and local Superior Court
- ✓ Complexity of the surface/ground water interactions
- ✓ Availability of scientific data on the hydrology of the basin

Local conditions

- ✓ Local and legislative support
- ✓ Unsuccessful watershed planning efforts
- ✓ Ability of community to respond and participate

Adjudication Plan ~ Possible Next Steps

The Default Future ~ current resources and current laws

- Acquavella will ramp down next biennium
- File next adjudication in 05-07 biennium
- Reinvest the \$3.6 M per biennium

- Adjudicate 2 basins every 5-10 years

- An ongoing activity (200 years to quiet title?)

An Alternative Future ~ dedicated expertise and streamlining/efficiencies

- Assume 3 water courts and 4 judges (or equivalent investment)
- Assume 3-5 basins per court, with 2-10 years per basin

- 10 years to 70 years to adjudicate the state

- \$12 M per biennium

A More Modest Future ~ prioritize and start small

- Prioritize and adjudicate 15 basins (1/4th of the state)
- Start with two water courts?

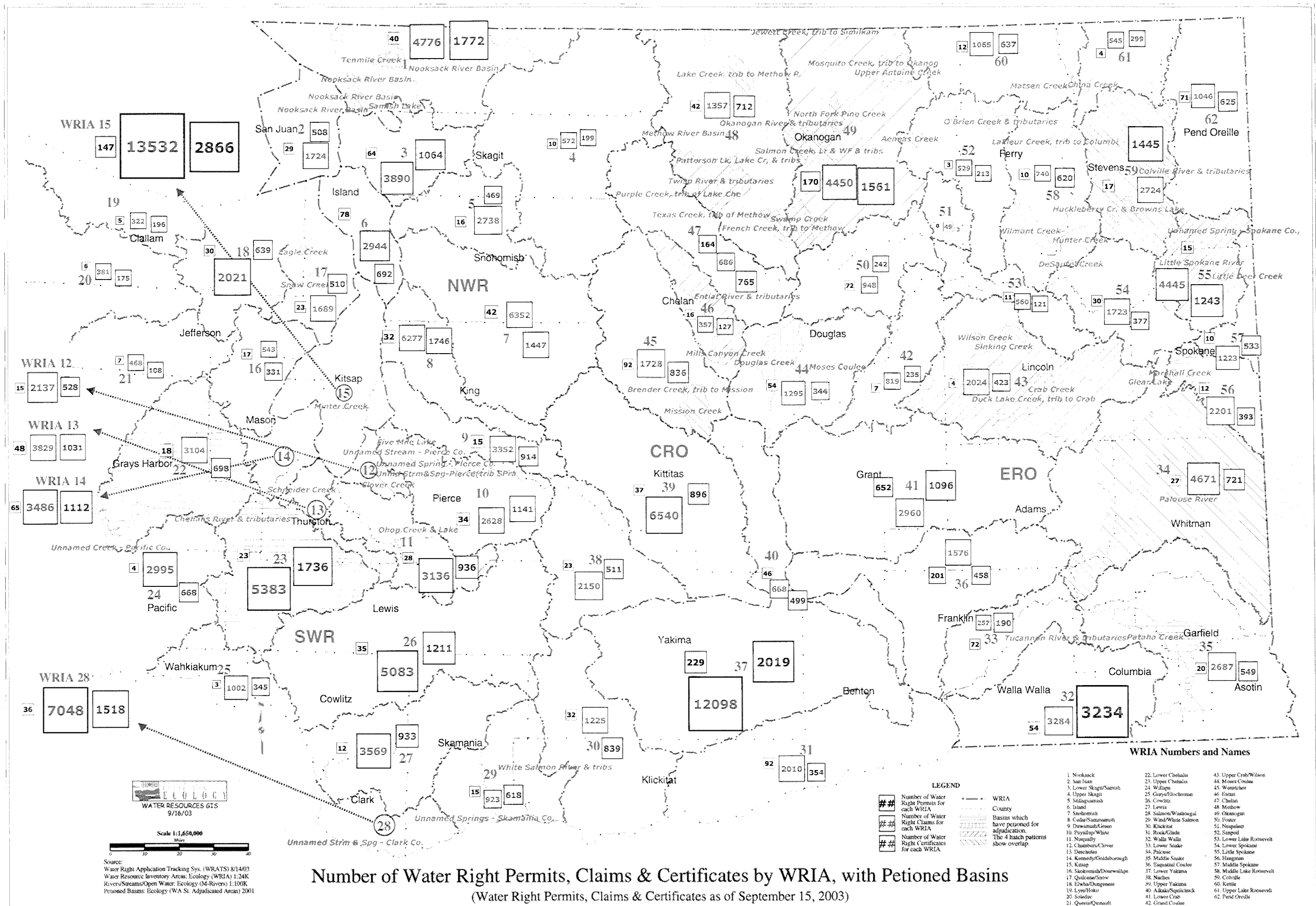
- Decide long-term plans based on these initial basins

- \$6 M per biennium

A choice for the Legislature

- Completion of the Acquavella case will require decisions on implementation and next steps.

- Ecology plans to bring these decisions to the Governor and the Legislature as part of the 05-07 budget request.



Number of Water Right Permits, Claims & Certificates by WRIA, with Petioned Basins
 (Water Right Permits, Claims & Certificates as of September 15, 2003)

